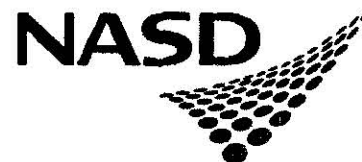


Richard E. Pullano
Associate Vice President & Chief Counsel
Registration and Disclosure

June 6, 2006



VIA MESSENGER

Ms. Katherine A. England
Assistant Director
Division of Market Regulation
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-02001

RE: File No. SR-NASD-2003-168 – Proposed Rule Change Relating to the Release of Information Through NASD's Public Disclosure Program (now known as BrokerCheck): Response to Comments

Dear Ms. England:

NASD hereby responds to the eight comment letters¹ received by the Securities and Exchange Commission ("Commission" or "SEC") in response to the publication in the Federal Register of Notice of Filing of SR-NASD-2003-168 (and Amendment Nos. 1, 2, and 3 thereto) relating to the release of information through NASD's public disclosure program (now known as "BrokerCheck").² The commenters focused their comments on NASD's proposal to disclose all of an individual's "Historic Complaints," which, for purposes of the proposed rule change, includes the information last reported on registration forms relating to customer complaints

¹ Barry Augenbraun, Senior Vice President and Corporate Secretary, Raymond James Financial, Inc. (July 8, 2005); Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Joseph D. Fleming, Managing Director and Chief Compliance Officer, Piper Jaffray & Co. (July 13, 2005); Jill Gross, Director of Advocacy/Rosario M. Patane, Student Intern, Pace Investor Rights Project (July 21, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005); Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005); John S. Simmers, CEO, ING (July 19, 2005); Coleman Wortham III, President and CEO, Davenport & Company LLC (July 19, 2005).

² See Securities Exchange Act Release No. 51915 (June 23, 2005), 70 FR 37880 (June 30, 2005) (Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Relating to the Release of Information Through the Public Disclosure Program).

that are more than two years old and that have not been settled or adjudicated; and customer complaints, arbitrations, or litigations that have been settled for an amount less than \$10,000.³ NASD, in its rule filing, proposed to disclose *Historic Complaints* if the most recent *Historic Complaint* or currently reported customer complaint, arbitration or litigation is less than ten years old and the person has a total of three or more currently disclosable regulatory actions; currently reported customer complaints, arbitrations or litigations; *Historic Complaints*; or any combination thereof.

One commenter suggested that all *Historic Complaints* should be disclosed to customers.⁴ The remaining seven commenters generally agreed that investors should have access to information that would enable them to make an informed decision concerning whether or not to conduct business with a particular registered person.⁵ Four of these commenters stated that they were generally supportive of NASD's efforts to help investors make informed decisions about the firms and persons with whom they were doing business,⁶ but all seven opposed NASD's current proposal to disclose *Historic Complaints* for a variety of reasons.

³ Also referred to as "archived" complaints, *Historic Complaints* are not required to be reported on the uniform registration forms and currently are not disclosed via BrokerCheck.

⁴ Jill Gross, Director of Advocacy/Rosario M. Patane, Student Intern, Pace Investor Rights Project (July 21, 2005).

⁵ Barry Augenbraun, Senior Vice President and Corporate Secretary, Raymond James Financial, Inc. (July 8, 2005); Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Joseph D. Fleming, Managing Director and Chief Compliance Officer, Piper Jaffray & Co. (July 13, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005); Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005); John S. Simmers, CEO, ING (July 19, 2005); Coleman Wortham III, President and CEO, Davenport & Company LLC (July 19, 2005).

⁶ Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005); Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005); John S. Simmers, CEO, ING (July 19, 2005).

Among other things, these commenters contended that this proposal would have a chilling effect on settlements because it would create an incentive to litigate all customer claims rather than, for example, settle a complaint for what might be a nuisance value, since a litigated win in favor of the broker would not be disclosed as a Historic Complaint. They contended that if firms opt to litigate in all cases rather than consider settling certain customer complaints, the customer would be faced with choosing potentially costly legal remedies or abandoning his or her complaint.

One commenter supported the current reporting system, in which customer complaints that are more than two years old and that have not been settled or adjudicated and customer complaints, arbitrations, or litigations that have been settled for an amount less than \$10,000 are archived.⁷ Two commenters noted that the current reporting requirements were initially created so that regulators could make informed licensing decisions and commence investigations and enforcement proceedings when and as deemed necessary. These commenters stated that the questions contained in the various registration applications were carefully developed so that unsubstantiated or frivolous claims would not forever unfairly damage a person's reputation.⁸

One commenter asserted that a customer cannot make an "informed assessment" based on pending, unsubstantiated, and unadjudicated customer complaints.⁹ Two commenters opposed the use of unadjudicated complaints when considering whether a pattern of misconduct exists.¹⁰ Two commenters stated that Historic Complaints are not necessarily indicative of wrongdoing and may not accurately portray a registered person's character and client relations.¹¹ They were concerned that the public may form a conclusion about a

⁷ Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005).

⁸ Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005).

⁹ John S. Simmers, CEO, ING (July 19, 2005); Coleman Wortham III, President and CEO, Davenport & Company LLC (July 19, 2005).

¹⁰ Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Coleman Wortham III, President and CEO, Davenport & Company LLC (July 19, 2005).

¹¹ Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005).

registered person based merely on unproven allegations if unresolved customer complaints are disclosed. Another commenter suggested that NASD be required to include a statement in the BrokerCheck report indicating that a matter may have been adjudicated because the customer declined to pursue the matter or that it was settled for a modest amount to avoid litigation.¹² One commenter asserted that a registered person should have the opportunity to defend against customer complaints before such complaints are used as the basis of expanded adverse disclosure.¹³

Additionally, two commenters contended that disclosure of customer complaints over a ten-year period would give a distorted picture of a registered person's character and customer relations.¹⁴ Other commenters contended that the disclosure threshold of three disclosable matters in ten years is an unreasonably low standard.¹⁵ One of these commenters also contended that NASD should exclude certain types of complaints when calculating the number of threshold regulatory events for purposes of disclosing Historic Complaints.¹⁶

Other commenters were concerned about disclosing Historic Complaints based on settlements of \$10,000 or less. Two commenters noted that firms might have chosen to settle customer complaints for a small amount of money as a way of maintaining good client relationships or as a way of avoiding expensive litigation.¹⁷ Three commenters asserted that

¹² Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005).

¹³ Coleman Wortham III, President and CEO, Davenport & Company LLC (July 19, 2005).

¹⁴ Barry Augenbraun, Senior Vice President and Corporate Secretary, Raymond James Financial, Inc. (July 8, 2005); Joseph D. Fleming, Managing Director and Chief Compliance Officer, Piper Jaffray & Co. (July 13, 2005).

¹⁵ Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005); Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005); John S. Simmers, CEO, ING (July 19, 2005).

¹⁶ Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005).

¹⁷ Ronald C. Long, Senior Vice President, Regulatory Policy and Administration, Wachovia Securities, LLC (July 25, 2005); John S. Simmers, CEO, ING (July 19, 2005).

releasing information about customer complaints that have been settled for \$10,000 or less and are no longer reportable after two years on an individual's Form U4 would inappropriately change the rules under which the Central Registration Depository system (CRD® or CRD system) and BrokerCheck currently operate.¹⁸ These commenters contended that registered persons have voluntarily agreed to these settlements with the understanding that they would no longer be reported to the public after two years. These commenters contended that many of these persons might not have chosen to enter into settlements had they known the rules regarding their release to the public might be changed; they believe that it is now unfair for the rules regarding disclosure of these events to change, especially considering that they may not be removed from a registered person's record unless he or she seeks to have them expunged.

In response to these commenters' concerns, NASD has developed an educational component of the proposed BrokerCheck report and Web site that it believes will enable the reader to view Historic Complaints in the appropriate context and give appropriate weight to Historic Complaints when evaluating a particular firm or registered person. First, an introductory section immediately preceding the BrokerCheck report will explain that some reported items may involve pending actions or allegations that may be contested and have not been resolved or proven, and that these items may be withdrawn or dismissed, resolved in favor of the registered person, or concluded through a negotiated settlement with no admission or conclusion of wrongdoing. Second, the report will include certain status information as to each Historic Complaint, so that the reader will know whether or not the complaint was settled.

Third, registered individuals will have the opportunity to submit information to provide context and perspective about any event, including Historic Complaints. Registered persons typically provide such information in a comment section on the Form U4 at the time a disclosure event is reported. If the registered person wishes to add to his or her previously submitted comment, or comment for the first time, the CRD system will permit the person, through his or her firm, to make an additional statement.¹⁹ If the person is no longer

¹⁸ Mario Di Trapani, President, Association of Registration Management (July 19, 2005); Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association (July 27, 2005); John S. Simmers, CEO, ING (July 19, 2005).

¹⁹ Assuming SEC approval of the proposed rule change, NASD will include instructions on how firms may amend archived disclosures in the Notice to Members announcing such approval and also post frequently asked questions and answers about this process on NASD's Web site.

registered, he or she may provide a comment through a signed affidavit to CRD.²⁰ Each person (whether registered or formerly registered, but still subject to BrokerCheck) will be responsible for ensuring that a Historic Complaint that is not currently disclosed through BrokerCheck adequately reflects his or her comment about the matter in the event that matter is disclosed to the public (based on the registered person's having met the expanded disclosure threshold). Finally, NASD will advise the reader (via the BrokerCheck report and the Web site) not to rely solely on the information available through the BrokerCheck program, but to learn as much as possible about the registered person from other sources.

Additionally, NASD is proposing to change the way in which it determines whether an individual's Historic Complaints become eligible for disclosure through BrokerCheck. NASD appreciates commenters' concerns that firms and registered persons made certain decisions with respect to customer complaints, arbitrations, or litigations based on the rules under which the CRD system and BrokerCheck currently operate (for example, electing to enter into a settlement for what they considered to be a nuisance value to maintain good client relationships or avoid expensive litigation). Accordingly, NASD is amending the proposed rule language to provide that Historic Complaints will be eligible for disclosure only if the matter became a Historic Complaint on or after the implementation date of the proposed rule change, *i.e.*, the matter was archived on or after the implementation date of the proposed rule change. NASD believes that it is in the public interest for those items that are available to the public through BrokerCheck on or after the implementation date of the proposed rule change to be eligible for disclosure as Historic Complaints.

The proposed modification to this rule change would continue to provide that NASD will disclose through BrokerCheck all of an individual's Historic Complaints that became Historic Complaints on or after the implementation date of the proposed rule change if (1) the most recent Historic Complaint or currently reported customer complaint, arbitration or litigation is less than ten years old; and (2) the person has a total of three or more currently disclosable regulatory actions; currently reported customer complaints, arbitrations or litigations, or Historic Complaints (subject to the limitation that they became a Historic Complaint on or after the implementation date of the proposed rule) or any combination thereof.

²⁰ NASD will not edit these statements except, consistent with current practice, NASD reserves the right to reject comments or redact information from a comment, on a case-by-case basis, that contains confidential customer information, offensive or potentially defamatory language or information that raises significant identity theft, personal safety or privacy concerns that are not outweighed by investor protection concerns.

Ms. Katherine A. England
Page 7

NASD believes that the foregoing fully responds to the issues raised by the commenters to the rule filing and that the revised approach described herein strikes a fair balance between public investors' interest in the background of the individuals with whom they do business and the concerns of participants in the securities industry. Please feel free to call me at (240) 386-4821 if you wish to discuss this further.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Pullano", with a stylized flourish at the end.

Richard E. Pullano

cc: Hoang Mai (Cyndi) Rodriguez
Kate Robbins